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Supreme Court of the United States

October Term, 1977
No. 77-629

ASHBY LEACH, R. RAYMOND TWOHIG,
ROGER HURLEY,
Petitioners,

vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised first in the Court of Appeals for Cuyahoga County on a Petition for a Writ of Mandamus. That Court refused to issue a Writ as to the Petitioners in the instant case. Upon appeal

to the Supreme Court of Ohio, Petitioners' appeal and application for Writ of Mandamus was dismissed. These Ohio Courts decided the case in accordance with the Ohio Constitution and relevant case law. No substantial federal question is presented by the Petition for Writ of Certiorari.

COUNTER QUESTIONS OF LAW

1. Where a petition filed in the Supreme Court or in the Court of Appeals of Ohio is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction.

2. The conclusion of any litigation renders moot those alleged legal issues which relate to protective orders issued by the subject court.

3. The issuance by a trial court of a protective order necessary to govern, regulate and control the conduct of a trial, when not prejudicial, is within the sound discretion of the trial court.

STATEMENT OF THE CASE

Ashby G. Leach was indicted by the Grand Jury of Cuyahoga County on September 1, 1976 for thirteen counts of kidnapping, one count of extortion, one count of possession of a criminal tool, and one count of felonious assault. The criminal episode which gave rise to this indictment occurred on August 26, 1976, when Leach held thirteen

people as hostages in the offices of the Chessie System in downtown Cleveland. Leach made a number of demands and threatened the innocent hostages with death for over nine hours before surrendering.

At his arraignment on September 2, 1976, Leach entered a plea of not guilty to all counts. Trial commenced in the courtroom of the Honorable Eugene Sawicki on March 14, 1977. On March 18, 1977, the trial judge issued a protective order proscribing extrajudicial statements by the defendant and counsel prior to the return of a verdict in the defendant's trial. Petitioners sought to attack this order by Writ of Mandamus in the Court of Appeals for Cuyahoga County and in the Supreme Court of Ohio. The Supreme Court granted a motion to dismiss the petition.

On April 5, 1977, the jury found Leach guilty of extortion, possession of a criminal tool, and assault.

REASONS FOR DENYING THE WRIT

1. Where a petition filed in the Supreme Court or in the Court of Appeals of Ohio is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction.

Ohio Revised Code, Section 2731.01 defines mandamus:

> "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law

specially enjoins as a duty resulting from an office, trust, or station."

Petitioners in the case at bar did not seek to compel the trial judge to do something. On the contrary they wanted to prevent him from doing something, i.e., enforcing the protective order promulgated at the start of the trial.

Ohio courts have consistently dealt with this question. In *State, ex rel. Penn Mutual Life Insurance Co. v. Hahn*, 50 Ohio St. 714 (1893), the relator filed a petition in mandamus and a demurrer to the answer of the respondent, which demurrer was overruled. The basis for the court's ruling was stated as follows:

". . . For such a complaint the remedy is clearly by injunction and not by mandamus.

• • •

It is manifest that the real object of the relator is to prevent the Superintendent of Insurance from revoking its license to do business in this state.

. . . Here the object is to enjoin the superintendent from revoking the license." (718)

Similarly, petitioners improperly sought a writ of mandamus when they should have sought an injunction to restrain the trial court from enforcing its order. As Minshall, J., in a concurring opinion in *Hahn* stated:

". . . This is a suit for an injunction in the form of a proceeding in mandamus. The form, however, is nothing; it is the substance that gives real character to the proceeding. Hence, this court has no jurisdiction of the subject matter of the suit, and it should be dismissed for want of jurisdiction." (719)

The Supreme Court of Ohio has more recently considered this issue in the case of *State, ex rel. Pressley v. Industrial Commission of Ohio*, 11 Ohio St. 2d 141 (1967), wherein the Syllabus of the opinion states:

"4. Where a petition filed in the Supreme Court or in the Court of Appeals is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction. (*State, ex rel. Stine v. McCaw*, 136 Ohio St. 41; *State, ex rel. v. Hahn*, 50 Ohio St. 714; *State, ex rel. Libbey-Owens-Ford Glass Co. v. Industrial Commission*, 162 Ohio St. 302, approved and followed.)"

Clearly, despite petitioners' label of "action in mandamus", they sought an injunctive remedy to restrain and enjoin the trial court from enforcing its order rather than to compel it to perform a clear legal duty. Thus their petition in the state courts did not state a cause of action and was properly dismissed by the Supreme Court of Ohio. Consequently, the petition for a Writ of Certiorari should be denied.

2. The conclusion of any litigation renders moot those alleged legal issues which relate to protective orders issued by the subject court.

The protective order issued by the trial court on March 18, 1977 was for the express purpose of insuring a fair trial for the defendant, now a Petitioner, Ashby Leach. It was in effect by its own terms only until the return of a verdict by the jury on April 5, 1977.

Any attack upon the legality of the protective order fails to present to this Court a justiciable controversy. Rather, with the termination of the action to which the protective orders were made applicable, any dispute concerning their legitimacy must be deemed hypothetical in nature, and therefore moot. Where an appellant has no legitimate interest to protect by an appeal, such appeal is moot so far as such appellant is concerned and must be dismissed. *Mid-America Telephone Co. v. P.U.C.O.*, 173 Ohio St. 333 (1962); see, *Travis v. Pub. Util. Comm. of Ohio*, 123 Ohio St. 355 (1931).

This Honorable Court, in *DeFunis v. Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974), reaffirmed the long-standing practice of hearing only those appeals which present a justifiable "case or controversy". Cf. *Marberry v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

With the conclusion of appellant's trial and the resultant verdict, there was effected a termination of the protective orders in issue. Petitioners conceded this point in the Courts of Appeals for Cuyahoga County when they filed a Motion for Expedited Hearing and Stay which stated: ". . . the writ will be moot absent a stay." For the foregoing reasons, petitioners' instant action is moot and the Petition for a Writ of Certiorari should be denied.

3. The issuance by a trial court of a protective order necessary to govern, regulate and control the conduct of a trial, when not prejudicial is within the sound discretion of the trial court.

The issuance of the protective order of March 18, 1977, by the trial court did not arbitrarily restrict the rights of Petitioners but rather was designed to protect the rights of the Petitioner Leach during the trial of his criminal case.

Due to the circumstances which preceded Petitioner Leach's trial, considerable publicity was generated and great public interest and awareness ensued. Viewed in this light, the protective order was necessary to shield the jury and to promote an atmosphere wherein the issues at trial could be fairly adjudicated solely on the law and the evidence, not the statements of counsel made outside of court. The issuance of a protective order so structured was well within the discretion of the trial court.

Petitioners' reliance upon this Honorable Court's decision in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) is not well founded. There the Court forbade restrictions by the trial court on the rights of the news media to publish accounts of the trial. In the instant case, the trial court merely proscribed the extra-judicial statements of counsel and the defendant. The media was free to report on anything and everything that happened in court including the protective order. In *Nebraska*, the Court said:

> "This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard v. Maxwell*, 384 U.S. at 361-362, 16 L. Ed. 2d 600, 86 S. Ct. 1507, 6 Ohio Misc. 231, 35 Ohio Op. 2d 431. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone." (427 U.S. at 564)

In *Sheppard v. Maxwell, supra*, the Court said:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as refusal of Sheppard to submit to

interrogation or take any lie detector tests. . ." (384 U.S. 333, at 361)

The American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968) recommended that:

"During the trial of any criminal matter, including the selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case."

A protective order similar to that involved in the instant case was at issue in *Hamilton v. Municipal Court for Berkeley-Albany Judicial District*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, 33 A.L.R.3d 1029 (1969), *cert. denied* 396 U.S. 985, 24 L. Ed. 2d 449, 90 S. Ct. 479. There the appellants deliberately violated a trial court's protective order and sought by a Writ of Prohibition to prevent the court from conducting a contempt of court hearing on the charge. Appellants were the defendants in the original criminal prosecution and their lawyers. They argued in the higher court that the trial court's order was an unconstitutional restriction upon their right of free speech. The court, citing *Sheppard v. Maxwell, supra,* said:

"We construe this language of the court to mean that in proper cases, where the right to fair trial may be at issue, the court is required to take steps to control the release and dissemination of facts and evidence likely to be presented to the court or the jury in the course of the trial. Thus authority for the

issuance of the pretrial order in this case seems to be unassailable." (270 Cal. App. 2d 797, at 800-801)

In response to the charge that the order in *Hamilton* was overly broad, the court said:

"The court's order sought only to have the issues judicially determined in open court, on competent evidence, rather than by the community upon the basis of information supplied by partisans and carried on by the news media. The order applied to the parties and their counsel. Such persons were before the court and subject to its proper orders." (270 Cal. App. 2d 797, at 804)

The trial court's restrictive order was not unconstitutional and the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing authority we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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